IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-966

ROBERT M. FLANNERY,

Appellant,

v.

CITY OF NORFOLK, VIRGINIA,

Appellee.

ON APPEAL FROM THE
SUPREME COURT OF VIRGINIA

MOTION TO DISMISS OR AFFIRM

PHILIP R. TRAPANI, Esquire
City Attorney
908 City Hall Building
Norfolk, Virginia 23510

Attorney for Appellee

Of Counsel:

DOUGLAS FREDERICKS, Esquire
Assistant City Attorney
908 City Hall Building
Norfolk, Virginia 23510

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

INDEX

TABLE OF AUTHORITIES

Cases:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-966

ROBERT M. FLANNERY,

Appellant,

v.

CITY OF NORFOLK, VIRGINIA,

Appellee.

ON APPEAL FROM THE
SUPREME COURT OF VIRGINIA

MOTION TO DISMISS OR AFFIRM

The appellee moves this Honorable Court to dismiss this appeal, or, in the alternative, to affirm the decision of the Supreme Court of Virginia on the ground that the question presented is so unsubstantial as not to need further argument, in that the ordinance challenged gave appellant fair warning of the criminality of his own conduct.

QUESTION PRESENTED BY THE APPEAL

The only question before this Court is whether or not that portion of Section 31-18 of The Code of the City of Norfolk, Virginia, 1958, as amended, which makes it unlawful for any person to keep, maintain or operate any disorderly house, as it was applied to Flannery under the facts in this case, is void for vagueness.[1]

STATEMENT OF THE FACTS OF THE CASE

Mr. Flannery owned and operated the Businessman's Massage Parlor located at 151 Granby Street, Norfolk, Virginia (App. 21, 32, 55-58, 107, 161, 162, 220)[2] (hereinafter referred to as "massage parlor"), and it had a reputation in the community for being a whorehouse (App. 28, 169).

On August 25, 1973, Officer Reilly of the Norfolk Police Department, entered the massage parlor and asked for a massage. After paying, he was directed to a room. When the masseuse came in she took off her bra for an extra ten dollars, and she told the officer he could play with her breasts. She then massaged his

[1] *United States v. Powell*, ____ U.S. ____, 96 S.Ct. ____, 46 L.Ed.2d 228 (1975). Since the issue of vagueness was the only federal question raised in the Supreme Court of Virginia, it is the only question before the Court in this case. *Street v. New York*, 394 U.S. 576, 582, 89 S.Ct. 1354, 22 L.Ed.2d 572, 579 (1969); *Cardinale v. Louisiana*, 394 U.S. 437, 438, 89 S.Ct. 1162, 22 L.Ed.2d 398, 400 (1969); *Bailey v. Anderson*, 326 U.S. 203, 207, 66 S.Ct. 66, 90 L.Ed. 3, 6 (1945); *Miller v. Nichols*, 4 Wheat. (17 U.S.) 311, 315, 4 L.Ed. 578, 579 (1819).

[2] All references with App. are to the page of the Appendix filed with the Supreme Court of Virginia in this case.

penis attempting to masturbate him (App. 59, 62, 63).

On September 1, 1973, Officer Reilly again entered the massage parlor, paid for a massage, and went to a back room. The masseuse again exposed her breasts by removing her blouse for an extra ten dollars. During this massage, she also solicited the officer for oral sodomy and sexual intercourse at a price, and without waiting for a reply attempted to place the officer's penis in her mouth. When he declined the offers, she massaged his penis attempting to masturbate him (App. 77-79).

On October 6, 1973, Officer Showalter entered the same massage parlor and paid sixty dollars for a super deluxe unisex massage. During this massage the masseuse wore nothing but pantyhose, exposing her breasts, and solicited the officer for oral sodomy. He declined her offer, and she then masturbated him to orgasm (App. 85-88).

On November 9, 1973, one Woody Richards, while working as an undercover agent for the Norfolk Police Department, entered this same massage parlor and paid for a massage. He was taken to a back room, where for ten dollars extra, the masseuse masturbated him to orgasm (App. 91).

On January 31, 1974, the same Woody Richards, still working as an undercover agent for the Norfolk Police Department, entered the massage parlor. He paid twenty dollars and was taken to a room. While in the room he was solicited for prostitution and made a date to consummate the act of sexual intercourse at a local hotel. The masseuse then masturbated Richards to orgasm (App. 92).

On February 8, 1974, Officer Acey of the Norfolk Police Department entered the same massage parlor and

paid for a massage. He was also masturbated (App. 99, 100).

On February 28, 1974, the date charged in the warrant, Officer Peterson entered this same massage parlor and paid for his massage. During the massage the masseuse solicited him for "something else" at a price of fifteen dollars, and subsequently masturbated him to orgasm (App. 104, 105).

Moreover, on December 14, 1973, Robert Flannery pleaded guilty to keeping and maintaining a house of ill fame on the premises of this same massage parlor, the date of the offense being September 1, 1973 (App. 37, 39-41, 44-46, 305, 306). Flannery knew there were convicted prostitutes working at the massage parlor but refused to take any action in reference thereto (App. 51). While it was his claim that he fired girls who would not stop soliciting, masturbating, etc. (App. 277), he did not answer when he was asked why Debra Dion Scott, a masseuse arrested in September, 1973, for masturbating Officer Reilly, was still there on May 8, 1974 (App. 240). In addition, Flannery told one police officer that if his girls did not masturbate the customers he would go out of business (App. 163).

Jeanne Rackham, an ex-employee of Flannery's at the massage parlor (App. 107) testified that Flannery had fondled her breasts while at the massage parlor (App. 109), and on a number of occasions, in her presence, fondled the breasts of other masseuses (App. 120, 131), also on the premises. She also had sexual intercourse with Robert Flannery more than one time while at the massage parlor (App. 109-111).

Miss Rackham also testified that on one occasion she observed another masseuse, naked, enter a massage

room with a customer who had solicited both of them for prostitution (App. 117-118).

The trial judge found the testimony of the police officers and undercover agent credible (App. 301) and that Jeanne Rackham's testimony was not entirely incredible (App. 302); he found that Flannery owned and operated the massage parlor (App. 300, 301); that he had knowledge of the myriad illegal activities which took place there (App. 303)[3] and that he did not make sufficient efforts to stop them (Id.)[4]

THE FEDERAL QUESTION IS NOT SUBSTANTIAL AND THE APPEAL SHOULD BE DISMISSED OR IN THE ALTERNATIVE THE DECISION SHOULD BE AFFIRMED

That portion of Section 31-18 of The Code of the City of Norfolk, Virginia, 1958, as amended, which Flannery is challenging reads as follows:

> "It shall be unlawful for any person in the city to keep, maintain or operate, . . . any disorderly house . . . ."[5]

---

[3] Flannery testified that he owned the massage parlor (App. 220), and that he constantly checked it (App. 226). He knew that his girls were always "doing something wrong" (App. 243).

[4] In determining sentence the trial court had evidence that Flannery had "been in and out of trouble for the past 24 years" (Presentence Report, p. 5), including nine misdemeanor convictions as an adult and a finding of not innocent on charges of "break and enter" and "larceny" as a juvenile (Presentence Report, pp. 1 and 2).

[5] Since Flannery was only charged with and convicted of keeping and maintaining a disorderly house, it is the only portion of the ordinance he has standing to challenge, if he has standing at all. *Colten v. Kentucky*, 407 U.S. 104, 111 fn. 3, 92 S.Ct. 1953, 32 L.Ed.2d 584, 590 fn. 3 (1972).

In its decision below, the Supreme Court of Virginia properly looked to the common law for the definition of a disorderly house. *Gilbert v. United States*, 370 U.S. 650, 655, 82 S.Ct. 1399, 8 L.Ed.2d 750, 754 (1962). Stating this already existing common law definition, the court held that keeping a disorderly house was:

> "[T]he maintenance of premises upon which activity occurred that either created a public disturbance or, although concealed from the public, constituted a nuisance *per se*, such as a gambling house or bawdy house." 216 Va. at 366, 218 S.E.2d at 734.

This has always been the law of Virginia. *Pope v. Commonwealth*, 131 Va. 776, 793, 109 S.E. 429, 435 (1921).

Nuisances *per se* are those things which "are nuisances at all times and under all circumstances". *Price v. Travis*, 149 Va. 536, 547, 140 S.E. 644, 647 (1927). Moreover, Section 48-7 of the Code of Virginia, 1950, as amended, declares that any person who knowingly maintains any building used for the purpose of "lewdness, assignation or prostitution . . . is guilty of (maintaining) a nuisance, ... " In enacting this statute the General Assembly of Virginia simply restated the well established common law rule that bawdyhouses or houses of lewdness, assignation or prostitution constitute nuisances *per se*. *Tedescki v. Berger*, 150 Ala. 649, 43 So. 960, 961, 11 L.R.A. (N.S.) 1060 (1907); *Weakley v. Page*, 102 Tenn. 178, 53 S.W. 551, 554 (1899); *Clementine v. State*, 14 Mo. 112, 115 (1851).

Since everyone is bound and presumed to know the law, *Lambert v. California*, 355 U.S. 225, 228, 78 S.Ct. 240, 2 L.Ed.2d 228, 231 (1957); *Shelvin-Carpenter Co. v. Minnesota*, 218 U.S. 57, 68, 30 S.Ct. 663, 54 L.Ed. 930, 935 (1910), and since Flannery was clearly

maintaining a house of prostitution, he cannot successfully challenge the ordinance for vagueness. There could have been no doubt in Flannery's mind that he was in violation of the ordinance, and as this Court recently held in *Parker v. Levy*, 417 U.S. 733, 756, 94 S.Ct. 2547, 41 L.Ed.2d 439, 458 (1974):

> "[O]ne who has received fair warning of the criminality of his own conduct from the statute in question is . . . (not) . . . entitled to attack it because the language would not give similar fair warning with respect to other conduct which might be within its broad and literal ambit. *One to whose conduct a statute clearly applies may not successfully challenge it for vagueness.*" (Emphasis added.)

See also: *Broadrick v. Oklahoma*, 413 U.S. 601, 610, 93 S.Ct. 2908, 37 L.Ed.2d 830, 839 (1973); *Austin v. Aldermen of Boston*, 7 Wall. (74 U.S.) 694, 699, 19 L.Ed. 224, 226 (1869).

This Court has recently decided *Rose v. Locke*, ____ U.S. ____, 96 S.Ct. ____, 46 L.Ed.2d 185, 188 (November 17, 1975), a case which involved a challenge of Tennessee's statute prohibiting "crimes against nature" on grounds of vagueness. The Court held:

> "It is settled that the fair warning requirement embodied in the Due Process Clause (only) prohibits the States from holding an individual 'criminally responsible for conduct which he could not reasonably understand to be proscribed.' (Citations omitted.)"

And in *United States v. Powell, supra*, at 46 L.Ed.2d 233, the Court held:

> "[I]t is well established that vagueness challenges to statutes which do not involve First Amendment

freedoms must be examined in the light of the facts of the case at hand."

See also: *United States v. Mazurie*, 419 U.S. 544, 550, 95 S.Ct. 710, 42 L.Ed.2d 706, 713 (1975); *United States v. National Dairy Products Corp.*, 372 U.S. 29, 32, 83 S.Ct. 594, 9 L.Ed.2d 561, 565 (1963).

Flannery certainly understood his conduct to be proscribed by the ordinance. Not only did his testimony reveal this fact,[6] but as the Supreme Court of Virginia commented in its decision below at 216 Va. 367, 218 S.E.2d 734:

"[A]ny reasonably intelligent person would know that repeated acts of oral sodomy, and solicitation therefor, performed in a commercial establishment open to the public by undressed females, constitutes a nuisance *per se* (house of prostitution) and, therefore, permitting such conduct to take place is unlawful under this ordinance."

Finally, it is urged that Flannery, as a matter of law, lacks standing to challenge this ordinance. As was said in *Parker v. Levy, supra*, 417 U.S. at 756, 41 L.Ed.2d at 457 in reversing the Court of Appeals:

"The result of the Court of Appeals' conclusion that Levy had *standing* to challenge the vagueness of these articles as they might be hypothetically applied to the conduct of others, even though he was squarely within their prohibitions, may stem from a blending of the doctrine of vagueness with the doctrine of overbreadth, but we do not believe it is supported by prior decisions of this Court." (Emphasis added.)

[6] Flannery testified at the trial that he was aware that his girls were always "doing something wrong" (App. 243).

And in *Broadrick v. Oklahoma, supra*, 413 U.S. at 610, 37 L.Ed.2d at 839:

"Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied *will not be heard to challenge that statute* on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court." (Emphasis added.)

CONCLUSION

The latest Supreme Court of the United States decision applicable to this case is *Rose v. Locke, supra*. Under the rules laid down by this Court in that case just over two months ago, this ordinance is constitutional. And it is clear that under the facts in this case, the ordinance certainly was not vague as it was applied to Mr. Flannery. *United States v. Powell, supra*. Moreover, there is a strong presumption that ordinances are constitutional, and the burden is on Mr. Flannery to show the contrary, which he has not done. *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388, 47 S.Ct. 114, 71 L.Ed. 303, 311, 54 A.L.R. 1016 (1926). Wherefore, the appellee, the City of Norfolk, respectfully requests this Court to grant its Motion to Dismiss for want of a substantial federal question, *Zucht v. King*, 260 U.S.

174, 176, 43 S.Ct. 24, 67 L.Ed. 194, 198 (1922), or in the alternative to affirm the decision of the Supreme Court of Virginia.

Respectfully submitted,
PHILIP R. TRAPANI, Esquire
908 City Hall Building
Norfolk, Virginia 23510

Attorney for Appellee

Of Counsel:

DOUGLAS FREDERICKS, Esquire
Assistant City Attorney
908 City Hall Building
Norfolk, Virginia 23510

CERTIFICATE

I hereby certify that on the 9th day of February, 1976, a true copy of the foregoing was mailed to Thomas W. Moss, Jr., Esquire, Moss and Moss, 830 Maritime Tower, Norfolk, Virginia 23510, and Hunter W. Sims, Jr., Esquire, Canoles, Mastracco, Martone, Barr and Russell, 1710 Virginia National Bank Building, Norfolk, Virginia 23510, counsel for appellant.

/s/ Philip R. Trapani
Philip R. Trapani